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SEP 17 2009

King County Prosecutor
Appellate Unit

SUPREME COURT NO. _____
NO. 61731-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

83654-0

FILED
SEP 25 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NIKEEMIA COUCIL,

Petitioner.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 SEP 17 AM 4:55

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer, Judge

PETITION FOR REVIEW

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RULES, STATES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner, Nikeemia Coucil, the appellant below, asks this Court to review the decisions referred to in Section B.

B. COURT OF APPEALS DECISION

Coucil requests review of the Court of Appeal's (Division I) published decision in State v. Coucil, __ Wn. App. __, 210 P.3d 1058 (2009), filed July 6, 2009, and the subsequent denial of his motion to reconsider filed August 18, 2009.[1]

C. ISSUE PRESENTED FOR REVIEW

Is RCW 9A.76.170(3)[2] ambiguous as to whether a defendant's bail jumping offense classification is to be based on the

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[1] The Slip Op. is attached as Appendix A and the denial of the motion to reconsider is attached as Appendix B.

[2] RCW 9A.76.170 provides:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.
>
> ....
>
> (3) Bail jumping is:
>
> (a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;
>
> (b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first

underlying offense as it was charged or the underlying offense for which a defendant was actually convicted?

D. WHY REVIEW SHOULD BE GRANTED

Review should be granted because Division I's decision conflicts with this Court's prior interpretation of RCW 9A.76.170(3) in State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007), and the Court of Appeals decisions in State v. Gonzalez-Lopez, 132 Wn. App. 622, 132 P.3d 1128 (2006), and State v. Williams, 133 Wn. App. 714, 136 P.3d 792 (2006). In those cases, the Courts explained the classification and sentencing provisions in 9A.76.170(3) apply for sentencing purposes only. Williams 162 Wn.2d at 187; Gonzalez-Lopez, 132 Wn. App. at 629; Williams, 133 Wn. App. at 716. Under Division I's holding, however, the classification for bail jumping occurs at the time a person fails to appear, not at the time of sentencing. This conflicts with above-noted cases. RAP 13.4(b)(1) and (2).

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degree;

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;

(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

E. RELEVANT FACTS

On July 15, 2007, the King County prosecutor charged petitioner Nikeemia Coucil with one count of felony harassment. CP 1-5. After Coucil failed to appear at a hearing, the State amended the information and added one count of bail jumping. CP 8-10.

The trial court granted Coucil's motion to sever the bail jumping charge. 2RP 6.[3] Coucil was first tried on the harassment charge, with the jury finding him guilty only of the lesser-included offense of misdemeanor harassment. CP 23-24. Coucil was later tried for bail jumping and found guilty. CP 96.

On April 25, 2008, the trial court entered the misdemeanor harassment judgment. CP 98-100. The trial court also entered a felony bail jumping judgment. CP 101-08.

On appeal, Coucil argued the trial court erred when it sentenced him for felony bail jumping since he was only convicted of misdemeanor harassment. Because RCW 9A.76.170(3) provides a bail jumping conviction may be classified according to

[3] Transcripts are referred to as follows: 1RP (July 31, 2007); 2RP (March 26, 2008); 3RP (March 27, 2008); 4RP (March 31, 2008); 5RP (April 1, 2008); 6RP (April 21, 2008); 7RP (April 22, 2008); 8RP April 25, 2008).

the underlying offense as charged or as convicted, Coucil argued the statute was ambiguous and the rule of lenity applied in his favor. See Brief of Appellant (BOA) at 6-9, Reply Brief of Appellant (RBOA) at 1-6, and Appellant's Motion for Reconsideration at 1-9.

Division I disagreed, holding the statute was not ambiguous because courts may infer that bail jumping classifications are based on the underlying charge or conviction at the time of the person failed to appear. See Appendix A.

F. ARGUMENT IN SUPPORT OF REVIEW

THE COURT OF APPEALS DECISION CONFLICTS WITH ITS OWN PRIOR DECISIONS AS WELL AS THIS COURT'S DECISION IN WILLIAMS AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

To be convicted of bail jumping, the defendant must be charged with "a particular [underlying] crime." State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (2000). However, the classification of the underlying felony or misdemeanor is not an essential element of bail jumping and is, instead, a penalty issue to be determined at the time of sentencing. State v. Williams, 162 Wn.2d at 188, 191.

The classification provisions are found in RCW 9A.76.170(3). Subsection (3) specifically provides a bail jumping offense is to be

classified as "[a] class C felony if the person was held for, charged with, or convicted of a class B or class C felony." However, the statute also provides bail jumping should be classified as "[a] misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor." Thus, on the one hand, the statute can be read as supporting the trial court's conclusion Coucil's bail jumping offense should be classified based on the underlying charge (a felony). On the other hand, however, it can be read as supporting Coucil's argument it should be classified based on the underlying conviction (a misdemeanor). See RBOA at 4-5. The statute is silent as to how to resolve this apparent ambiguity. As such, the rule of lenity, which requires courts to adopt the interpretation most favorable to the defendant, applies. See State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991); see also BOA at 6-9 and RBOA at 1-6.

Division I rejected this argument, noting:

> Only by accepting Council's contention that bail jumping's seriousness remains undetermined until sentencing can the statute be considered ambiguous. If instead, the offense is classified according to when it actually occurs – when the offender "fails to appear" – any ambiguity vanishes.

Appendix A at 3-4. Division I disagreed the Legislature created a statutory scheme by which the bail jumping penalty classification is determined at sentencing based on the posture of the case at that time. Appendix A at 4. However, this is precisely the way the statute, as previously interpreted by Washington Courts, functions.

Three years ago, Division I itself explained:

> A plain reading of the statute shows that section (1) defines the elements of the crime for the purpose of determining guilt. The State must prove beyond a reasonable doubt that a person has been "released by court order or admitted to bail," the requisite knowledge of either a "subsequent personal appearance" or a "requirement to report to a correctional facility for service of sentence," and a failure to either "appear or [surrender for service of sentence]." Significantly, section (1) does not include within the elements defining guilt any reference to the provisions of section (3) of the statute, which defines the penalty classes of bail jumping.

Gonzalez-Lopez, 132 Wn. App. 622, 629, 132 P.3d 1128 (2006).

Building on this, Division I later explained:

> [T]he penalty classification is **relevant only to the sentence** to be imposed on conviction, a topic the jury is not even permitted to consider in its deliberations. It is not an element of the crime, so there was no infirmity in the information or the 'to convict' instruction here.

State v. Williams, 133 Wn. App. 714, 716, 136 P.3d 792 (2006) (emphasis added).

The next year, this Court cited Division I's language with approval as it, too, concluded the penalty classification provision relevant only for sentencing. Williams, 162 Wn.2d, at 187. Based on this progression of the case law, 9A.76.170(3)'s classification provisions come into operation only at sentencing, not at the time the offense was committed. Until sentencing, the bail jumping offense remains unclassified.

In reaching its conclusion to the contrary, Division I engaged in the following grammatical analysis:

> Inasmuch as the penalty classifications in RCW 9A.76.170 use the present tense, [applying the classification at the time one fails to appear] is the sole reasonable reading of the statute. Thus, a person who, while released on bail, knowingly "fails to appear" for a court hearing "is" guilty of bail jumping, which "is" (at that time) either a class A, B, or C felony, or a gross misdemeanor or misdemeanor, depending on the underlying offense's classification....Here, Council's interpretation is contrary to the verb tense used in the plain text of the statute itself and, thus, is not reasonable. The statute is not ambiguous.

Appendix A at 4.

Division I overlooked one critical verb, however, which significantly impacts its textual analysis. RCW 9A.76.170 (3) provides:

> (3) Bail jumping is:

> (a) A class A felony if the person **was** held for, charged with, or convicted of murder in the first degree;
>
> (b) A class B felony if the person **was** held for, charged with, or convicted of a class A felony other than murder in the first degree;
>
> (c) A class C felony if the person **was** held for, charged with, or convicted of a class B or class C felony;
>
> (d) A misdemeanor if the person **was** held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

Emphasis added. This is where the ambiguity arises. At the time of sentencing, appellant **was** charged with a felony, but he **was** convicted of a misdemeanor.

There is no statutory language suggesting the penalty classification is to be applied based on the status of the case "at the time" the defendant fails to appear and no basis for a reviewing court to read that language into the statute to resolve the ambiguity. See State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (explaining a reviewing court may not add language to a statute where the Legislature inadequately expressed the intent to do so); see also State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005), and RBOA at 2-4. Yet, this is exactly what Division I did:

> Thus, a person who, while released on bail, knowingly "fails to appear" for a court hearing "is" guilty of bail jumping, which "is" **(at that time)** either a class A, B,

or C felony, or a gross misdemeanor or misdemeanor, depending on the underlying offense's classification.

Appendix A at 4 (emphasis added).

For the reasons explained above petitioner respectfully asks this Court to accept review of Division I's decision which misapprehends the plain language of the statute and improperly adds language to reach a conclusion contrary to existing Supreme Court and Court of Appeals opinions.

G. CONCLUSION

Because the Court of Appeals decision departs from well-established case law, yet stands as a guide for the lower courts, it involves an issue of substantial public interest that should be reviewed by this Court. RAP 13.4(b)(1), (2) and (4).

DATED this 17th day September, 2009.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
Respondent,	)	No. 61731-1-I
v.	)	PUBLISHED OPINION
NIKEEMIA COUCIL,	)	
Appellant.	)	FILED: July 6, 2009

DWYER, A.C.J. — Nikeemia Coucil was arrested and charged with felony harassment after threatening to kill Paul Carlson. Released on bail, Coucil failed to appear at a hearing on the charge. He was eventually rearrested, tried, and convicted of a lesser-included charge of misdemeanor harassment. He was also charged with and convicted of bail jumping. On appeal, Coucil contends that because he was convicted of misdemeanor (rather than felony) harassment, his bail jumping conviction should have been sentenced as a misdemeanor. We disagree. Because bail jumping is classified for sentencing purposes according to the nature of the underlying charge at the time the defendant jumps bail, not on the basis of the underlying charge's ultimate disposition, we affirm.

Coucil's primary contention on appeal[1] is that because the sentencing provisions of the bail jumping statute, RCW 9A.76.170, define bail jumping's seriousness according to the underlying offense that the defendant was either "held for, charged with, or convicted of," the statute is ambiguous and must be construed using the rule of lenity. Thus, Coucil contends, he must be sentenced based on the time at which the underlying crime's penalty classification was the least severe: when he was "convicted of" a misdemeanor, instead of when he was "charged with" a felony. The statute, however, is not ambiguous. Bail jumping is classified according to when it occurs.

RCW 9A.76.170 both defines bail jumping and sets forth its penalties:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.
>
> . . . .
>
> (3) Bail jumping is:
>
> (a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;
>
> (b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first

[1] Coucil also contends that his harassment conviction must be reversed because a police witness unconstitutionally opined at trial as to both Carlson's credibility and Coucil's guilt. But Coucil did not object to this testimony, and so must demonstrate that any claimed error amounted to a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Such a showing requires that Coucil identify a "nearly explicit statement . . . that the witness believed the accusing victim" or a similarly explicit statement that Coucil was guilty. State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). It also requires that Coucil demonstrate that the challenged testimony "had practical and identifiable consequences in the trial of the case." Kirkman, 159 Wn.2d at 935 (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

Coucil fails to make either showing. The first variety of testimony that Coucil challenges (three references to Carlson as the "victim") served only to differentiate Carlson from other bus riders. The second variety of challenged testimony (a statement that Coucil had "maliciously harassed" Carlson), when viewed in context, was nothing more than an expression of the witness's belief that he had probable cause to arrest Coucil. Moreover, Coucil does not even attempt to demonstrate the manner in which the two types of allegedly constitutionally prohibited statements affected the outcome of his trial.

> degree;
>
> (c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;
>
> (d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

The bail jumping penalty classifications are not essential elements of the offense. Rather, they define the seriousness of an incident of bail jumping for purposes of sentencing. State v. Williams, 162 Wn.2d 177, 184, 170 P.3d 30 (2007).

The issue presented is *when* the seriousness of any particular incident of bail jumping—and, thus, its penalty—is determined. From Coucil's perspective, whether bail jumping constitutes an A, B, or C class felony, or a gross misdemeanor or misdemeanor, is determined according to the status of the underlying offense at the time of sentencing on the bail jumping charge. Thus, under Coucil's theory, the seriousness of bail jumping changes over time based on the status of the offense that the bail jumper was "held for, charged with, or convicted of." According to Coucil, this scheme is inherently ambiguous and, thus, requires us to apply the rule of lenity, favoring the lightest sentence. Given that Coucil was *charged with* felony harassment but *convicted of* misdemeanor harassment, he argues, he may only be sentenced for *misdemeanor* bail jumping.

Coucil attempts to read ambiguity into the statute where none exists.[2] Only by accepting Coucil's contention that bail jumping's seriousness remains undetermined until sentencing can the statute be considered ambiguous. If, instead, the offense is classified according to when it actually occurs—when the

[2] The rule of lenity does not apply when a statute is unambiguous. State v. Fisher, 139 Wn. App. 578, 585, 161 P.3d 1054 (2007).

offender "fails to appear"—any ambiguity vanishes. Inasmuch as the penalty classifications in RCW 9A.76.170 use the present tense, this is the sole reasonable reading of the statute. Thus, a person who, while released on bail, knowingly "fails to appear" for a court hearing "is" guilty of bail jumping, which "is" (at that time) either a class A, B, or C felony, or a gross misdemeanor or misdemeanor, depending on the underlying offense's classification.

Under this scheme, the presence of the serial disjunctive "held for, charged with, or convicted of" in each of the bail jumping offense classifications is easily explained: a person can be released on bail, and so jump bail, while being simply *held for* a crime (i.e., prior to arraignment), while *charged with* a crime (i.e., following arraignment, but prior to trial), or while *convicted of* a crime (i.e., following trial). "A statute is ambiguous [only] if it is susceptible to two or more *reasonable* interpretations." State v. Hall, 147 Wn. App. 485, 489, 196 P.3d 151 (2008) (emphasis added). Here, Coucil's interpretation is contrary to the verb tense used in the plain text of the statute itself and, thus, is not reasonable. The statute is not ambiguous. "There is no need to interpret statutes that are unambiguous." In re Pers. Restraint of Silas, 135 Wn. App. 564, 569, 145 P.3d 1219 (2006). Hence, the rule of lenity is inapplicable. Under the statute's plain language, the seriousness of an incident of bail jumping is determined by the status of the underlying offense at the time that the offender jumps bail.

Even were the statute ambiguous, competing canons of construction would preclude resort to the rule of lenity. Of particular relevance is the principle that "statutes should be construed to effect their purpose and unlikely, absurd or

strained consequences should be avoided." State v. Fiermestad, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). It would not further the purpose of the bail jumping statute—to compel appearances at criminal hearings—to allow defendants to wager the penalty for jumping bail against the result of their trials on the underlying charges. Taken to its logical conclusion, Coucil's interpretation would allow defendants acquitted of the underlying charges to suffer no penalty at all for jumping bail, because they would not be "held for, charged with, or convicted of" the underlying offenses at the time of sentencing.[3]

Coucil's interpretation of the statute is strained at best, given that the bail jumping statute is *not* intended to add to or diminish the punishment associated with the underlying offense. This being so, it is unsurprising that his interpretation is also inconsistent with case law. See, e.g., State v. Gonzalez-Lopez, 132 Wn. App. 622, 624-25, 638, 132 P.3d 1128 (2006) (bail jumping conviction affirmed when defendant acquitted of underlying charge).

Affirmed.

Dwyer, A.C.J.

WE CONCUR:

Ellington, J.

Grosse, J.

[3] Furthermore, the rule of lenity itself does not mandate the interpretation of the statute urged by Coucil. Pursuant to that interpretation, bail jumping penalties could be as easily ratcheted upward as downward—for example, where an assault victim dies after his or her assailant is charged, converting the underlying offense into a homicide.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
Respondent,	)	No. 61731-1-I
v.	)	ORDER DENYING MOTION FOR RECONSIDERATION
NIKEEMIA COUCIL,	)	
Appellant.	)	

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 18th day of August, 2009.

FOR THE COURT:

Dwyer, A.C.J.